Supreme Court, U.S.
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No. 95-1402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
ESTATE OF OTIS C. HUBERT, DECEASED,
C&S SOVERAN TRUST COMPANY
(GEORGIA) N.A., A NATIONAL
BANKING ASSOCIATION, CO-EXECUTOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICI CURIAE BAPTIST FOUNDATION OF TEXAS AND TERRY L. SIMMONS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF INTEREST
OF *AMICI CURIAE*.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT.....4

CONCLUSION.....14

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Bob Jones University v. United States,
461 U.S. 574 (1983).....11

Commissioner v. Estate of Sternberger,
348 U.S. 187 (1955).....11

Estate of Hubert v. Commissioner,
101 T.C. 314 (1993),
aff'd, 63 F.3d 1083 (11th Cir. 1995) 9

Estate of Street v. Commissioner,
56 T.C.M. (CCH) 774 (1988), *aff'd in part*
and rev'd in part, 974 F.2d 723 (6th Cir. 1992).....9

Flanagan v. United States,
810 F.2d 930 (10th Cir. 1987).....11, 12

Hartwick College v. United States,
801 F.2d 608 (2d Cir. 1986).....10, 11

Helvering v. Bliss, 293 U.S. 144 (1934).....7, 8

McGlotten v. Connally,
338 F. Supp. 448 (D.D.C. 1972).....9, 10

Norris v. Commissioner,
134 F.2d 796 (7th Cir. 1943).....8, 9, 12

United States v. Provident Trust Company,
291 U.S. 272 (1934).....7

Y.M.C.A. v. Davis, 264 U.S. 47 (1924).....6, 8, 11

STATUTES

26 U.S.C. § 642(c).....10

26 U.S.C. § 642(g).....13

26 U.S.C. § 2053.....13

26 U.S.C. § 2055.....5, 10, 13

26 U.S.C. § 2055(c).....5

26 U.S.C. § 2056.....5

26 U.S.C. § 2056(b)(4)(A).....5

26 U.S.C. § 2056(b)(4)(B).....5

OTHER AUTHORITIES

Bruce R. Hopkins, *The Tax Law of*
Charitable Giving § 1.4 (1993)
(quoting "Proposals for Tax Change,"
Department of the Treasury,
April 30, 1973, at 72).....6

H.R. Rep. No. 1860, 75th Cong.,
3d Sess. 19 (1938).....10

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are Baptist Foundation of Texas (hereinafter referred to as the "Foundation"), represented by Terry L. Simmons as its Senior Vice President and General Counsel, and Terry L. Simmons, individually.

The Foundation was established in 1930 as an incorporated agency of The Baptist General Convention of Texas for the purpose of managing the endowment assets of other Baptist institutions af-

filiated with either The Baptist General Convention of Texas, the Southern Baptist Convention or other state Southern Baptist conventions. The Foundation also provides technical consultation to Baptist institutions and ministries and facilitates charitable gifts made by donors for the benefit of these Baptist causes.

Funds managed by the Foundation are utilized for causes designated by donors. Income earned from investments is distributed according to the specific directions of the donors or, in the absence of specific directions, by action of the Executive Board of The Baptist General Convention of Texas. The Foundation makes no grants.

The Foundation has become a clearinghouse for information related to charitable giving for the agencies it serves so that the Foundation and other charitable agencies can continue to provide the services to society that they have since their inception. The Foundation is committed to the basic Christian principles and sound business practices on which it was established and, within this framework, has set investment and trust guidelines which reflect this commitment.

The Foundation submits that the position advocated by the Petitioner, if validated by the Court, would cause serious harm to charities served by the Foundation because of the reduced gift values and the actual potential reduction in testamentary gifts themselves.

Individually, Terry L. Simmons has practiced law primarily in the exempt organizations area for the past sixteen years. Practicing through both the Foundation and Thompson & Knight, P.C. in Dallas, Texas, he represents charities almost exclusively.

Mr. Simmons has been an advocate for charities nationally, having led or participated in several national efforts to enact legislation increasing or retaining incentives for charitable giving.

Mr. Simmons has served as President of the National Committee on Planned Giving, an organization with 90 local chapters around the country with total membership of over 9,000 attorneys, accountants, trust officers, financial planners, life underwriters and charitable gift planners within charitable institutions. A goal of the National Committee on Planned Giving is to promote a positive atmosphere for gifts to charity, thus encouraging the growth and sustenance of the American system of philanthropy.

Mr. Simmons is a partner, co-editor and co-publisher of *Charitable Gift Planning News*, a monthly newsletter which comments on judicial, legislative and regulatory actions affecting charities. This newsletter is utilized by many of the country's most prestigious law schools and law firms as a resource in the charitable gift planning area.

The organizations represented by Mr. Simmons depend to a large extent on testamentary gifts. Furthermore, philanthropy in general depends on testamentary gifts for a significant portion of the critical resources necessary to carry out charitable activities.

The Foundation and Mr. Simmons respectively submit that the position taken by the Internal Revenue Service and advocated by the Treasury and Justice Departments in this case is mistaken, and that if it is sustained in the United States Supreme Court, will constitute a genuine and significant disincentive to giving by American citizens. Both the Foundation and Mr. Simmons have great respect for the country's system of tax laws and for those who regulate and enforce them. However, recognizing the broad public policy served by the system of incentives which Congress has created to cultivate and grow the philanthropic sector, *amici curiae* feel compelled as leaders in the nonprofit world to present their arguments to the Supreme Court in this case.

SUMMARY OF ARGUMENT

Petitioner's position is illogical within the total framework of the Internal Revenue laws of the United States. In providing for the estate tax charitable deduction as well as the income and gift tax charitable deductions, Congress clearly intended to encourage gifts to charity for public purposes. Consequently, Internal Revenue Code sections which provide for charitable deductions should be liberally construed by the courts to allow the maximum benefit to charity. The position of Petitioner would result in an artificial reduction in the estate tax charitable (and marital) deduction in an arbitrary and artificial manner without diverting the dollars to any alternate purpose, but merely producing additional tax revenue for the federal government. Nowhere in the Internal Revenue Code is there any suggestion of support for the Petitioner's argument. Consequently, Petitioner's argument flies in the face of Congressional intent and should be rejected by the Court.

ARGUMENT

This *amici curiae* brief is filed in support of the position taken by Respondent in this litigation. It is filed with the express permission of Petitioner and Respondent, the letters expressing such consent having been filed with the Clerk of the Court.

Respondent has amply made the case that the payment of post-death estate administration expenses out of post-death income of the estate, paid therefrom by the executor subject to his discretionary authority to do so, does not reduce the marital deduction or charitable deduction for purposes of computing the estate tax due in the estate. This brief is intended to support and amplify the position taken by Respondent with regard to the charitable deduction and is intended to provide additional support and authority for the Court's consideration with regard to the statutory and judicial context within which the deduction for charitable purposes is contemplated.

As Respondent's brief clearly establishes, Petitioner's argument as to the marital deduction provisions of the Internal Revenue Code shows that Petitioner is fundamentally incorrect in its interpretation of 26 U.S.C. § 2056 and its related provisions. The marital deduction provisions enacted by Congress in 1948 contained two net value provisions, including 26 U.S.C. § 2056(b)(4)(A) and 26 U.S.C. § 2056(b)(4)(B). Of relevance in this case is the fact that 26 U.S.C. § 2056(b)(4)(A), which directs that the effect of any estate, succession, legacy or inheritance tax shall be taken into account in determining the allowable marital deduction, has a corresponding provision for the charitable deduction found in 26 U.S.C. § 2055(c). However, it is important to note that there is no corresponding provision regarding the charitable deduction in 26 U.S.C. § 2055 for 26 U.S.C. § 2056(b)(4)(B), which directs that any obligation incurred by a spouse as a result of a gift or any other encumbrance on gifted property be taken into account in determining the value of the gift and the corresponding marital deduction. Therefore, Petitioner's argument, in attempting to apply its reasoning under 26 U.S.C. § 2056(b)(4)(B) to the charitable deduction, is patently and even fatally flawed in that no provision even remotely resembling 26 U.S.C. § 2056(b)(4)(B) appears in the testamentary charitable deduction provisions as set out in 26 U.S.C. § 2055. Clearly, the intentional action of Congress in omitting a parallel provision to 26 U.S.C. § 2056(b)(4)(B) from 26 U.S.C. § 2055 plainly and conclusively evidences the historically strong Congressional intent that testamentary charitable gifts are to be encouraged and that provisions regulating testamentary charitable gifts are to be liberally construed to accomplish the purposes of Congress.

In testimony before Congress in 1973, then Secretary of the Treasury George P. Shultz stated the importance of charitable gifts and their deductibility as follows:

> These organizations ["voluntary charities, which depend heavily on gifts and bequests"]

> are an important influence for diversity and a bulwark against over-reliance on big government. The tax privileges extended to these institutions were purged of abuse in 1969 and we believe the existing deductions for charitable gifts and bequests are an appropriate way to encourage those institutions. We believe the public accepts them as fair.

Bruce R. Hopkins, *The Tax Law of Charitable Giving* § 1.4 at 13 (1993) (quoting "Proposals for Tax Change," Department of the Treasury, April 30, 1973, at 72).

The principle supporting favorable interpretation of Internal Revenue Code sections which provide for deductions to charity is representative of a consistent position of the courts with regard to deduction provisions dating to the earliest days of the tax system, particularly the estate tax system of our country. In the case of *Y.M.C.A. v. Davis*, 264 U.S. 47 (1924), the Court noted that:

> Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him "If you will make such gifts, we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you give."

Id. at 50. Irrespective of the fact that the resolution of specific points of law in this case may not be relevant today, the Court's holding clearly construes an intent by Congress from the genesis of

the estate tax charitable deduction that this deduction be interpreted liberally by the courts.

In *United States v. Provident Trust Company*, 291 U.S. 272 (1934), the Court sought to determine whether an executor would be allowed to recognize the fact that the beneficiary of an estate was incapable of bearing children where the relevant dispositive provision of the will provided for a contingent gift to charity upon the woman's death, should she die without issue. In finding that it was appropriate to allow a deduction for the remainder interest reduced only by the present value of the life interest of the woman, the Court noted:

> We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evidencing a legislative policy to encourage such bequests.

Id. at 285.

The case of *Helvering v. Bliss*, 293 U.S. 144 (1934), presented the question of whether deductions on account of charitable contributions were to be taken from net income as defined by Section 21 of the Revenue Act of 1928 or from ordinary net income as defined by Section 101(c)(7) of the Revenue Act of 1928. It being more advantageous to taxpayers to have deductions taken against net income as defined in Section 21 of the Act, the Court so interpreted the statutory framework of the Revenue Act of 1928. In doing so, the Court stated as follows:

> The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives

> of public policy, and are not to be narrowly construed.

Id. at 150-51.

The United States Court of Appeals for the Seventh Circuit recognized the intent of Congress to encourage charitable gifts in its opinion for the case of *Norris v. Commissioner*, 134 F.2d 796 (7th Cir. 1943). Referring to the relevant estate tax charitable provisions of the Revenue Act of 1926, the Seventh Circuit noted that:

> On numerous occasions courts have expressed the opinion that Congress in enacting this legislation sought to encourage gifts to charity, ... by the charitably inclined.

Id. at 798 (citing *Y.M.C.A. v. Davis*, 264 U.S. 47, 50 (1924)). Furthermore, based upon existing case law and Section 303(a)(3) of the Revenue Act of 1926 which provided for the estate tax charitable deduction, the court concluded that:

> Congress intended to reduce the basis of Federal estate tax by such amounts as were given to charity. We believe also that the congressional intent was to prefer charity gifts to estate taxes. It was a case of absolute priority. This legislative intent should not be whittled down by judicial construction. If courts are to respect this legislative expressed intent to encourage gifts to charity, we should not approve of the practice of the Commissioner of resolving doubts in favor of the Government.

Norris, 134 F.2d at 801.

The Seventh Circuit went on to note that even such a clear statement of the intent of Congress should not allow "loopholes" that enable taxpayers to avoid taxes in a way unintended by Congress. *Id.* at 801. In so finding, the court literally defined the difference between cases which justify a result such as that sought by the Petitioner in the case currently before the Court and those which reflect the purpose of the stated intent of Congress. The findings of the Tax Court in *Estate of Street v. Commissioner*, 56 T.C.M. (CCH) 774 (1988), *aff'd in part & rev'd in part*, 974 F.2d 723 (6th Cir. 1992), and the findings of the Tax Court in *Estate of Hubert v. Commissioner*, 101 T.C. 314 (1993), *aff'd*, 63 F.3d 1083 (11th Cir. 1995), with 15 of 17 judges sitting holding for Respondent, by definition cannot be called a loophole. At best, the question presented in this case is a "close call." While *amici curiae* do not accept such a contention, should it be the case, the liberal interpretation compelled by Congress would require the Court to find in favor of Respondent.

The case of *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972), involved a suit against a charity by an African American male who had been deprived membership in the charitable organization. The court, which found for the plaintiff on two of three assertions, stated:

> The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.

Id. at 456. Quoting from a committee report of the House Ways and Means Committee which accompanied the Revenue Act of 1938, the court noted as follows:

> The Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds.

Id. at 456 (quoting H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938)). Obviously, the system of charitable deductions found throughout the Internal Revenue Code is not composed of isolated provisions floating free of any tie to reality. Rather, this system is based upon the firm foundation of Congressional intent and the full recognition of Congress that the allowance of charitable deductions and the utilization of resulting charitable gifts by exempt organizations is a most efficient manner with which to accomplish societal objectives and reduce the parental role of government. That was the case in *McGlotten*, and it remains the case in the matter currently before the Court.

In *Hartwick College v. United States*, 801 F.2d 608 (2d Cir. 1986), the United States Court of Appeals for the Second Circuit considered the issue of whether or not the entire amount of income earned by an estate during the period of administration, which was permanently set aside for charity, was deductible for income tax purposes on Form 1041 which was filed by the estate or whether the deduction was limited to an algebraically determined amount, taking into consideration the taxes to be paid on the income. In discounting the algebraic theory advanced by the government, the court stated:

> We conclude that Congress knew that the algebraic formula for calculations would not be used unless expressly provided for by statute and that by limiting its amendment to § 2055 it did not contemplate that the formula would be applied under other statutes such as § 642(c). Moreover, its limited authorization of the formula is in keeping with the countervailing policy in

> favor of a liberal construction of statutes authorizing deductions for charitable contributions
> ....

Id. at 615.

Finally, in the case of *Flanagan v. United States*, 810 F.2d 930 (10th Cir. 1987), a case extraordinarily similar to the one now before the Court, the decedent executed an instrument denominated as a revocable living trust which was witnessed and notarized as a will and contained testamentary provisions including a charitable bequest. The gift to charity was in the nature of a split-interest transfer, but it did not qualify for the charitable deduction. A dispute arose concerning the validity of the document as a testamentary instrument, and a settlement among the parties resulted in an outright gift to charity which was treated as such on the estate tax return. This arrangement was challenged by the government, arguing that since the gift was a split-interest gift under the will, it must remain so in any agreement between the parties in lieu of litigation.

In holding that the settlement agreement reached by the parties resulted in an outright gift to charity which validated the claimed deduction, the Tenth Circuit noted the position of this Court in *Bob Jones University v. United States*, 461 U.S. 574 (1983), that:

> [w]hile the Supreme Court "has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code," this authority must still be reviewed with regard to congressional intent.

Flanagan, 810 F.2d at 934 (quoting *Bob Jones University*, 461 U.S. at 596-97 (1983)). Citing *Commissioner v. Estate of Sternberger*, 348 U.S. 187, 190 n.3 (1955), and *Y.M.C.A. v. Davis*,

264 U.S. 47, 50 (1924), the Tenth Circuit also stated: "In enacting the charitable deduction provisions in I.R.C. § 2055 and its predecessors, Congress sought to encourage gifts to charity." *Flanagan*, 810 F.2d at 934. Continuing, the court noted:

> We agree with the Seventh Circuit's formulation in *Norris v. Commissioner*, 134 F.2d 796 (7th Cir.), *cert. denied*, 320 U.S. 756, 64 S. Ct. 63, 88 L. Ed. 450 (1943), that congressional intent to prefer charitable gifts to estate taxes was "a case of absolute priority ...."

Flanagan, 810 F.2d at 934-35 (quoting *Norris*, 134 F.2d at 801 (1943)). The *Flanagan* court then concluded that "we cannot blindly resolve all doubts in favor of the IRS if we are to respect legislative intent to encourage gifts to charity." *Flanagan*, 810 F.2d at 935.

Amici curiae would draw to the Court's attention that the position of Petitioner is contrary to a long and unbroken string of cases, as evidenced by the cases cited within this brief which date back virtually to the very beginning of the estate tax charitable deduction in our country and continue to the present date. The position of Petitioner would result in an artificial reduction in the estate tax charitable (and marital) deduction in an arbitrary and artificial manner without diverting the dollars to any alternate purpose, but merely producing additional tax revenue for the federal government.

While conceding that the paramount role of Petitioner is to zealously seek revenue for the government, this zeal must stop at the gates of a clear statement of Congressional intent spanning many generations. In this case, even more so than in the cases cited above as authority for the premise of liberally interpreting the charitable deduction provisions, the position of Petitioner is untenable. The decedent intended to provide substantial benefits to charity through his will. Clearly, his will made careful provision for that

intention. The final settlement agreement preserves that intention with great clarity. In fact, no party questions the clear intent of the decedent to make a gift to charity. Furthermore, nothing in 26 U.S.C. § 2053 or 26 U.S.C. § 642(g) (the provisions of the Internal Revenue Code which give the executor of an estate the discretion to take administration expenses as a deduction from the estate for estate tax purposes or from the income tax of the estate on Form 1041) constitutes even indirectly a limitation on the general liberal intent of Congress to further philanthropy (as specifically embodied in this instance as to the charitable deduction by 26 U.S.C. § 2055). Rather, Congress has offered implicit but clear guidance to the federal courts to employ a liberal interpretation of the charitable deduction statutes. This is specifically true with regard to the claim asserted by Petitioner in this case which was firmly and correctly rejected by the Eleventh Circuit Court of Appeals.

Respectfully, it is submitted that the position of Petitioner is not logical within the total framework of the Internal Revenue laws of the United States as repeatedly interpreted by its courts over eight decades and that it cannot and should not withstand the scrutiny of this Court.

CONCLUSION

The holdings of the Eleventh Circuit in this case should be affirmed in all respects.

Respectfully submitted,

INDIVIDUALLY AND ON
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